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HOHFELD'S CONTRIBUTIONS TO THE SCIENCE OF LAW

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It is a commonplace that the vast majority of the members of the legal profession in English-speaking countries still regard "jurisprudence" in all its manifestations, and especially that branch of it commonly known as "analytical jurisprudence," as something academic and without practical value. It is believed that the chief reason, or at least one of the reasons, for this view is not hard to discover. Almost without exception the writers who have dealt with the subject seem to have proceeded upon the theory that their task was finished when they had set forth in orderly and logical array their own analysis of the nature of law, of legal rights and duties, and similar things. That the making of this analysis—aside from the mere intellectual joy of it—is not an end in itself but merely a means to an end, these writers perceive only dimly or not at all; that the analysis presented has any utility for the lawyer and the judge in solving the problems which confront them, they do not as a rule attempt to demonstrate; much less do they show that utility by practical application of the analysis to the solution of concrete legal problems.

In the opinion of the present writer one of the greatest messages which the late Wesley Newcomb Hohfeld during his all too short life gave to the legal profession was this, that an adequate analytical jurisprudence is an absolutely indispensable tool in the equipment of the properly trained lawyer or judge—indispensable, that is, for the highest efficiency in the discharge of the daily duties of his profession. It was Hohfeld's great merit that he saw that, interesting as



WESLEY NEWCOMB HOHFELD

analytical jurisprudence is when pursued for its own sake, its chief value lies in the fact that by its aid the correct solution of legal problems becomes not only easier but more certain. In this respect it does not differ from any other branch of pure science. We must hasten to add, lest we do an injustice to Hohfeld's memory by thus emphasizing his work along the line of analytical jurisprudence, that no one saw more clearly than he that while the analytical matter is an indispensable tool, it is not an all-sufficient one for the lawyer. On the contrary, he emphasized over and over again—especially in his notable address before the Association of American Law Schools upon *A Vital School of Jurisprudence*—that analytical work merely paves the way for other branches of jurisprudence, and that without the aid of the latter satisfactory solutions of legal problems cannot be reached. Thus legal analysis to him was primarily a means to an end, a necessary aid both in discovering just what the problems are which confront courts and lawyers and in finding helpful analogies which might otherwise be hidden. If attention is here directed chiefly to Hohfeld's work in the analytical field, it is by reason of the fact that the larger portion of his published writings is devoted to that subject, in which he excelled because of his great analytical powers and severely logical mind.

Hohfeld's writings consist entirely of articles in legal periodicals and are scattered through the pages of several of these, as the following list will show:

- The Nature of Stockholders' Individual Liability for Corporation Debts* (1909) 9 COLUMBIA LAW REVIEW, 285.
The Individual Liability of Stockholders and the Conflict of Laws (1909) 9 COLUMBIA LAW REVIEW, 492; (1910) 10 *ibid.* 283; 10 *ibid.* 520.
The Relations Between Equity and Law (1913) 11 MICHIGAN LAW REVIEW, 537.
Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL, 16; (1917) 26 *ibid.* 710.
The Need of Remedial Legislation in the California Law of Trusts and Perpetuities (1913) 1 CALIFORNIA LAW REVIEW, 305.
A Vital School of Jurisprudence and Law (1914) Proceedings of Association of American Law Schools.
The Conflict of Equity and Law (1917) 26 YALE LAW JOURNAL, 767.
Faulty Analysis in Easement and License Cases (1917) 27 YALE LAW JOURNAL, 66.

At the time of his illness and death Hohfeld was planning the completion and publication in the immediate future of the analytical work so well begun in the three articles which must be regarded as the most important contributions which he made to the fundamentals of legal theory, viz. the two upon *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, and the one upon *The Relations Between Equity and Law*. These three essays contain in broad outline what are

perhaps the most important portions of the contemplated treatise. Buried away in the pages of the magazines in which they were published they are, like so many other important discussions in the legal periodicals, but little known even to the more intelligent and better educated of the practicing lawyers and judges, or indeed of the law teachers of the country. If the present number of the *JOURNAL* succeeds in bringing these discussions to the attention of a larger number of the legal profession it will have accomplished its purpose.

"Fundamental Legal Conceptions as Applied in Judicial Reasoning"—the very title reveals the true character of Hohfeld's interest in the analytical field. "As applied in judicial reasoning"—that is the important thing; fundamental legal conceptions not in the abstract, but used concretely in the solving of the practical problems which arise in the every-day work of lawyer and judge.

Before we examine the main outlines of the structure which Hohfeld had planned and started to build, let one thing be clearly said. No one realized more clearly than did he that none of us can claim to have been the originator of any very large portion of any science, be it legal or physical. It is all that can be expected if each one of us succeeds in adding a few stones, or even one, to the ever-growing edifice which science is rearing. It follows that anything which one writes must largely be made up of a re-statement of what has already been said by others in another form. Each one of us may congratulate himself if he has added something of value, even if that consists only in so re-arranging the data which others have accumulated as to throw new light upon the subject—a light which will serve to illuminate the pathway of those who come after us and so enable them to make still further progress.

In the first of the two essays upon Fundamental Legal Conceptions Hohfeld sets forth the eight fundamental conceptions in terms of which he believed all legal problems could be stated. He arranges them in the following scheme:

Jural Opposites	{right no-right	privilege duty	power disability	immunity liability
Jural Correlatives	{right duty	privilege no-right	power liability	immunity disability

One thing which at once impresses itself upon one who is familiar with law, and especially with the work of writers upon jurisprudence who preceded Hohfeld, is that the terms found in this scheme are with one exception not new, but have always been more or less frequently used. To be sure, they have not ordinarily been used with precision of meaning as in the table we are considering; on the contrary, they have been given one meaning by one person, another by another, or indeed, different meanings by the same person upon different occa-

sions. It is also true that nearly all the concepts which these terms represent in Hohfeld's system have been recognized and discussed by more than one writer upon jurisprudence.¹ A brief consideration serves to show, however, that the concepts and terms which are new are needed to logically complete the scheme and make of it a useful tool in the analysis of problems. When so completed, these legal concepts become the "lowest common denominators" in terms of which all legal problems can be stated, and stated so as to bring out with greater distinctness than would otherwise be possible the real questions involved. Moreover, as previously suggested, the writers who did recognize many of these concepts failed to make any real use of them in other portions of their work.²

That the word *right* is often used broadly to cover legal relations in general has probably been at least vaguely realized by all thoughtful students of law. Thus, to take a concrete example, nearly all of us have probably noted at some time or other that the "right" (privilege) of self-defense is a different kind of "right" from the "right" not to be assaulted by another; but that legal thinking can never be truly accurate unless we constantly discriminate carefully between these different kinds of rights, few of us have sufficiently realized. We constantly speak of the right to make a will; the right of a legislative body to enact a given statute; of the right not to have one's property taken without due process of law, etc. In these and innumerable other instances it turns out upon examination that the one word "right" is being used to denote first one concept and then another, often with resulting confusion of thought.

With the clear recognition of the fact that the same term is being used to represent four distinct legal conceptions comes the conviction that if we are to be sure of our logic we must adopt and consistently use a terminology adequate to express the distinctions involved. The great merit of the four terms selected by Hohfeld for this purpose—right, privilege, power and immunity—is that they are already familiar to lawyers and judges and are indeed at times used with accuracy to express precisely the concepts for which he wished always to use them.

Right in the narrow sense—as the correlative of *duty*—is too well known to require extended discussion at this point. It signifies one's affirmative claim against another, as distinguished from "privilege," one's freedom from the right or claim of another. *Privilege* is a term of good repute in the law of defamation and in that relating to

¹ Terry, *Leading Principles of Anglo-American Law*, ch. VI, 84-138; Salmond, *Jurisprudence* (4th ed.) ch. X, 179-196.

² Terry seems to the present writer the only one who even glimpsed the importance of these concepts in the actual analysis and settlement of legal problems.

the duty of witnesses to testify. In defamation we say that under certain circumstances defamatory matter is "privileged," that is, that the person publishing the same has a *privilege* to do so. By this statement we are not asserting that the person having the privilege has an affirmative claim against another, i. e., that that other is under a duty to refrain from publishing the defamatory matter, as we are when we use "right" in the strict sense, but just the opposite. The assertion is merely that under the circumstances there is an *absence of duty* on the part of the one publishing the defamatory matter to refrain from doing so under the circumstances. So in reference to the duty of a witness to testify: upon some occasions we say the witness is privileged, i. e., that under the circumstances there is an absence of duty to testify, as in the case of the privilege against self-incrimination.³ "Privilege" therefore denotes absence of duty, and its correlative must denote absence of right. Unfortunately there is no term in general use which can be used to express this correlative of privilege, and the coining of a new term was necessary. The term devised by Hohfeld was "no-right," obviously fashioned upon an analogy to our common words *nobody* and *nothing*. The exact term to be used is, of course, of far less importance than the recognition of the concept for which a name is sought. The terms "privilege" and "no-right," therefore, denote respectively absence of duty on the part of the one having the privilege and absence of right on the part of the one having the "no-right."⁴

All lawyers are familiar with the word "power" as used in reference to "powers of appointment." A person holding such a "power" has the legal ability by doing certain acts to alter legal relations, viz., to transfer the ownership of property from one person to another. Now the lawyer's world is full of such legal "powers," and in Hohfeld's terminology any human being who can by his acts produce changes in legal relations has a legal *power* or powers. Whenever a power exists, there is at least one other human being whose legal relations will be altered if the power is exercised. This situation Hohfeld described by saying that the one whose legal relations will be altered if the power is exercised is under a "*liability*." Care must be taken to guard against misapprehension. "Liability" as commonly used is a vague term and usually suggests something

³ Here the statement that there is a "right" against self-crimination does indeed carry, in addition to the idea of privilege, that of a right *stricto sensu*, and also when the general "right" in question is given by the constitution, of legal immunity, with correlative lack of constitutional power, i. e. disability, on the part of the legislative body to abolish the privilege and the right.

⁴ Doubtless some will deny that these conceptions—privilege and no-right—are significant as representing legal relations. See the brief discussion of this point by the present writer in (1918) 28 YALE LAW JOURNAL, 391.

disadvantageous or burdensome. Not so in Hohfeld's system, for a "liability" may be a desirable thing. For example, one who owns a chattel may "abandon" it. By doing so he confers upon each person in the community a legal power to acquire ownership of the chattel by taking possession of it with the requisite state of mind.⁵ Before the chattel is abandoned, therefore, every person other than the owner is under a legal "liability" to have suddenly conferred upon him a new legal power which previously he did not have. So also any person can by offering to enter into a contract with another person confer upon the latter—without his consent, be it noted—a power by "accepting" the offer to bring into existence new legal relations.⁶ It follows that every person in the community who is legally capable of contracting is under a *liability* to have such a power conferred upon him at any moment.

Another use of the term "right," possibly less usual but by no means unknown, is to denote that one person is not subject to the power of another person to alter the legal relations of the person said to have the "right." For example, often when we speak of the "right" of a person not to be deprived of his liberty or property without due process of law, the idea sought to be conveyed is of the exemption of the person concerned from a legal power on the part of the persons composing the government to alter his legal relations in a certain way. In such cases the real concept is one of exemption from legal power, i. e., "*immunity*." At times, indeed, the word "immunity" is used in exactly this sense in constitutional law.^{6a} In Hohfeld's system it is the generic term to describe any legal situation in which a given legal relation vested in one person can not be changed by the acts of another person.⁷ Correlatively, the one who

⁵ That is, with the intention of appropriating it. If the possession were taken merely with the intention of keeping it for its owner, the interest acquired would be merely that of any other person lawfully in possession, with an added power to acquire ownership by the formation of an intention to appropriate the article in question. In either case the other members of the community would, simultaneously with the assumption of possession by the finder, lose their powers to acquire ownership of the article.

⁶ For an application of the above analysis to the formation of contracts, see Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations* (1917) 26 YALE LAW JOURNAL, 169.

^{6a} One has, to be sure, a right (in the strict sense) not to be deprived of his physical liberty or tangible "property" except by due process of law, and doubtless this is what is frequently meant when it is said that one has the "right" in question. At other times, however, the idea meant to be conveyed is not this, but rather, as stated in the text, legal exemption from power on the part of the legislature of the state to alter one's legal relations in a certain way. In such cases the word "right" really stands for *immunity*.

⁷ One may, of course, with reference to any given legal relation or set of relations, have an immunity against one person and not against another, against people generally and not against "everybody."

lacks the power to alter the first person's legal relations is said to be under a "disability," that is, he lacks the legal power to accomplish the change in question. This concept of legal "immunity" is not unimportant, as Salmond in his "Jurisprudence" seems to indicate by placing it in a brief footnote. For example, the thing which distinguishes a "spendthrift trust" from ordinary trusts is not merely the lack of power on the part of the *cestui que trust* to make a conveyance of his interest, but also the *immunities* of the *cestui* from having his equitable interest divested without his consent in order to satisfy the claims of creditors.⁸ Ordinary exemption laws, homestead laws, etc., also furnish striking illustrations of immunities.⁹

A power, therefore, "bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative 'control' over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation."¹⁰

The conceptions for which the terms "liability" and "disability" stand have been criticized by Dean Pound of the Harvard Law School as being "quite without independent jural significance."¹¹ He also regards the terms themselves as open to objection on the ground that "each name is available and in use for other and important legal conceptions." The latter point while important is after all a question of phraseology. Upon the first point, it is difficult to follow Dean Pound's argument. The eight concepts of Hohfeld's classification are the means by which we describe generically the legal relations of persons. Any given single relation necessarily involves two persons. Correlatives in Hohfeld's scheme merely describe the situation viewed first from the point of one person and then from that of the other. Each concept must therefore, as a matter of logic, have a correlative. If A has a legal "power," he must by definition have the legal ability by his acts to alter some other person's legal relations.¹² If so, then—as Dean Pound himself recognizes later on

⁸ Cf. the situation under the federal Homestead Exemption Law, discussed in (1919) 28 YALE LAW JOURNAL, 283.

⁹ Usually a person having an immunity is also vested with other legal relations which accompany it, but this is true of legal relations generally; nearly every situation upon analysis turns out to involve a more or less complex aggregate of all the different kinds of legal relations. The vital point in many cases, however, involves primarily the presence or absence of an immunity rather than some other legal relation.

¹⁰ Hohfeld, in the article in 23 YALE LAW JOURNAL.

¹¹ In his discussion of *Legal Rights* in (1916) 26 INTERNATIONAL JOURNAL OF ETHICS, 92, 97.

¹² His own also, or those of still another person, as where an agent makes a

in the same discussion—that other person “is subject to have” his legal relations “controlled (altered) by another.” Certainly, call it what you will, we have here a perfectly definite legal concept, the correlative of “power.” So of “disability”: If A is legally exempt from having one or more of his legal relations changed by B’s acts, the situation as seen from B’s point of view is that B can not so alter A’s relations, i. e., B is under a legal “disability.” Again the particular term may be open to criticism; the conception involved is as clearly the correlative of “immunity” as “no-right” is the correlative of “privilege”; nevertheless, Dean Pound seems to recognize the “independent jural significance of the latter¹³ while denying that of the former.

Rights, privileges, powers, immunities—these four seem fairly to constitute a comprehensive general classification of legal “rights” in the generic sense. The four correlative terms—duty, no-right, liability and disability—likewise sufficiently classify the legal burdens which correspond to the legal benefits.^{13a} It is interesting in passing to note that of the two writers who preceded Hohfeld, neither Terry nor Salmond had completed the scheme. In Terry’s *Principles of Anglo-American Law*, rights *stricto sensu* appear as “correspondent rights,” privileges as “permissive rights,” powers as “facultative rights”; but immunities not at all. Moreover the correlatives are not worked out. In Salmond’s *Jurisprudence* privileges are called “liberties”—a mere question of phraseology,—immunities are treated as relatively unimportant, and liability is treated as the correlative of both liberty (privilege) and power. This assignment of a single correlative for two independent conceptions must result sooner or later in confusion of thought, for if the distinction between privilege and power be valid—as it clearly is—then the distinction between the correlatives, no-right and liability, must be equally valid.

The credit for the logical completion of the scheme of classification and the recognition of the importance of each element in it may thus fairly be given to Hohfeld. It is believed also that his presenta-

contract for a principal; but in each case he cannot act so as to alter his own or this other person’s legal relations without altering at the same time the first person’s relations, since the concept involved is of the legal relation of *one person to another person*. A lead-pencil must have two ends; so must a legal relation.

¹³ Dean Pound does not even mention *immunity*, but that of course disappears as a fundamental legal conception if we deny the jural significance of its correlative, *disability*. Note that in dealing with the correlatives, we are looking at the same situation from the point of view of first one and then the other of the two persons involved, but that when dealing with the jural opposites we are looking at two different situations from the point of view of the same person, i. e. in one situation he has, for example, a right, in the other, “no-right.”

^{13a} “Burden” is here used loosely. A liability, as previously pointed out, may be a beneficial thing.

tion of it in the form of a table of "jural correlatives" and "jural opposites" has done much to clarify and explain it. A still more important thing, as has been suggested above, is that he demonstrated how these fundamental legal concepts were of the utmost utility and importance in bringing about a correct solution of concrete legal problems. Here also credit to some extent must in all fairness be given to Terry, as above indicated, but Hohfeld seems to the present writer to be the first one who appreciated to the full the real significance of the analysis. In the first of the articles upon Fundamental Legal Conceptions he demonstrated its utility by many examples from the law of contracts, torts, agency, property, etc., showing how the courts are constantly confronted by the necessity of distinguishing between the eight concepts and are all too often confused by the lack of clear concepts and precise terminology. On the other hand, so clear a thinker as Salmond has shown himself to be in his *Jurisprudence* fails to make any substantial use of the analysis in his book on *Torts*. Indeed, so far as the present writer has been able to discover, one might read his *Torts* through and never realize that any such analysis as that found in the *Jurisprudence* had ever been made. Yet the problems involved in such subjects as easements, privilege in defamation, and other portions of the law of torts too numerous to mention, require for their accurate solution careful discrimination between these different concepts.

Even in the work on *Jurisprudence* itself Salmond completely fails in certain chapters to show an appreciation of the meaning of these fundamental conceptions. Consider, for example, the following passage from the chapter on "Ownership":

"Ownership, in its most comprehensive signification, denotes the relation between a person and any right that is vested in him. That which a man *owns* is in all cases a *right*. When, as is often the case, we speak of the ownership of a material object, this is merely a convenient figure of speech. To *own* a piece of land means in truth to *own* a *particular kind of right* in the land, namely *the fee simple* of it."¹⁴

From the point of view of one who understands the meaning of the eight fundamental legal concepts, it would be difficult to pen a more erroneous passage. To say that A owns a piece of land is really to assert that he is vested by the law with a complex—exceedingly complex, be it noted—aggregate of legal rights, privileges, powers and immunities—all relating of course to the land in question. He does not *own* the rights, etc., he *has* them;^{14a} because he has them,

¹⁴ Salmond, *Jurisprudence*, 220.

^{14a} When used with discrimination, the word *own* seems best used to denote the legal consequences attached by law to certain operative facts. So used, it of course connotes that these facts are true of the one said to own the article in

he "owns" in very truth the material object concerned; there is no "convenient figure of speech" about it. To say that A has the "fee simple" of a piece of land is, therefore, to say not that he "owns a particular kind of *right* in the land" but simply that he has a very complex aggregate of rights, privileges, powers and immunities, availing against a large and indefinite number of people, all of which rights, etc., naturally have to do with the land in question.

The full significance and great practical utility of this conception of "ownership" would require a volume for its demonstration. When one has fully grasped it he begins to realize how superficial has been the conventional treatment of many legal problems and to see how little many commonly accepted arguments prove. He discovers, for example, that "*a right of way*" is a complex aggregate of rights, privileges, powers and immunities; is able to point out precisely which one of these is involved in the case before him, and so to demonstrate that decisions supposed to be in point really dealt with one of the other kinds of "rights" (in the generic sense) and so are not applicable to the case under discussion. He soon comes to look upon this newer analysis as an extraordinary aid to clearness of thought, as a tool as valuable to a lawyer as up-to-date instruments are to a surgeon.

In the second of the articles upon Fundamental Legal Conceptions Hohfeld outlined in brief the remainder of the work as he planned it, as follows:

"In the following pages it is proposed to begin the discussion of certain important classifications which are applicable to each of the eight individual jural conceptions represented in the above scheme. Some of such overspreading classifications consist of the following: relations *in personam* ('paucital' relations), and relations *in rem* ('multital' relations); common (or general) relations and special (or particular) relations; consensual relations and constructive relations; primary relations and secondary relations; substantive relations and adjective relations; perfect relations and imperfect relations; concurrent relations (i. e., relations concurrently legal and equitable) and exclusive relations (i. e., relations exclusively equitable). As the bulk of our statute and case law becomes greater and greater, these classifications are constantly increasing in their practical importance: not only because of their intrinsic value as mental tools for the comprehending and systematizing of our complex legal materials, but also because of the fact that the opposing ideas and terms involved are at the present time, more than ever before, constituting part of the normal foundation of judicial reasoning and decision."¹⁵

question. If we confine *own* to this meaning, obviously we can not say that one *owns* a right or other legal relation, for the latter is itself one of the legal consequences denoted by the word *own*. On the other hand, we commonly do say that one *has* a right, a power, etc., and this usage does not seem undesirable or likely to lead to any confusion, even though we also say one *has* a physical object.

¹⁵ (1917) 26 YALE LAW JOURNAL, 712.

Of this comprehensive programme, only two parts were even partially finished at the time of Hohfeld's untimely death, viz., that devoted to a discussion of the classification of legal relations as *in rem* ("multital") and *in personam* ("paucital") and that dealing with the division of legal relations into those which are "concurrent" and those which are "exclusive."

The division of "rights" into rights *in rem* and rights *in personam* is a common one and is frequently thought to be of great importance. It is, however, a matter upon which there is still much confusion even on the part of those who are as a rule somewhat careful in their choice of terms. As the present writer has elsewhere pointed out, as able a thinker as the late Dean Ames at times used the phrase "right *in rem*" in a sense different from that given to it in the usual definitions, apparently without being conscious of the fact that he was doing so.¹⁶ In the second of the articles upon Fundamental Legal Conceptions Hohfeld sought by careful discussion and analysis to dispel the existing confusion. In doing so he necessarily went over much ground that is not new. The greatest merit of his discussion seems to the present writer to consist in bringing out clearly the fact that legal relations *in rem* ("multital" legal relations) differ from those *in personam* ("paucital") merely in the fact that in the case of the former there exists an indefinite number of legal relations, all similar, whereas in the case of the latter the number of similar relations is always definitely limited. For this reason he suggested the name "multital" for those which are *in rem* and "paucital" for those *in personam*. These new terms have, to be sure, other things to commend them: (1) they are free from all suggestion that legal relations *in rem* relate necessarily to a physical *res* or thing or are "rights against a thing";¹⁷ (2) they do not lead to the usual confusion with reference to the relation of rights *in rem* and *in personam* to actions and procedure *in rem* and *in personam*.¹⁸

Even a slight consideration of the application of this portion of Hohfeld's analysis to "ownership" of property will show the extent of his contribution at this point. It is frequently said that an owner of property has "*a right in rem*" as distinguished from "*a mere right in personam*." As has already been pointed out above, what the owner of property has is a very complex aggregate of rights, privileges, powers and immunities. These legal relations prove on examination to be chiefly *in rem*, i. e., "multital." Looking first at the owner's

¹⁶ (1915) 15 COLUMBIA L. REV. 43.

¹⁷ "*A cestui que trust* has an equitable right *in rem* against the land and not merely a right *in personam* against the holder of the legal title." Professor Zechariah Chafee, Jr., in (1918) 31 HARV. L. REV. 1104.

¹⁸ See the present writer's discussion of this point in (1915) 15 COLUMBIA L. REV. 37-54.

rights in the strict sense—these clearly include a large number that are *in rem*. Note the plural form—"rights." As Hohfeld very properly insisted, instead of having a single right *in rem*, the "owner" of property has an indefinite number of such rights—as many, that is, as there are persons under correlative duties to him. A single right is always a legal relation between a person who has the right and some one other person who is under the correlative duty.¹⁹ Each single right ought therefore to be called "*a right in rem*," or a "multital" right. The "ownership" includes the whole group of rights *in rem* or "multital" rights, as well as other groups of "multital" privileges, "multital" powers, and "multital" immunities.²⁰

Familiarity with an adequate analysis of this kind reveals the hopeless inadequacy of a question which has frequently been asked and to which varying answers have been given, viz., whether a *cestui que trust* has "*a right in rem*" or "*a right in personam*."²¹ The so-called "equitable title" of the *cestui* proves upon analysis to consist of an exceedingly complex aggregate of legal relations—rights, privileges, powers, and immunities. These in turn upon examination are found to include groups of rights *in rem* or "multital" rights—differing perhaps in some details from common-law rights *in rem* but nevertheless true rights *in rem* according to any accurate analysis. So of the privileges, the powers, the immunities, of the "equitable owner"—groups of "multital" relations are found.²² In other words, the usual analysis to which we have been accustomed has treated a very complex aggregate of legal relations as though it were a simple thing, a unit. The result is no more enlightening than would it be were a chemist to treat an extraordinarily complex chemical compound as if it were an element.

This reference to the true nature of the legal relations vested in a *cestui que trust* leads to a consideration of the only other portion of Hohfeld's contemplated treatise which was in any sense completed, viz., his classification of legal relations as "concurrent" and "exclusive." This is found in the MICHIGAN LAW REVIEW article entitled *The Relations between Equity and Law*. This essay was written after

¹⁹ In (1917) 26 YALE LAW JOURNAL, 710, 742, Hohfeld seems to recognize that there may be a single "joint right" or "joint duty." It is believed that as a matter of substantive law this concept cannot be justified, although it is entirely correct so far as procedural law is concerned.

²⁰ Illustrations will be found in the article under discussion.

²¹ "Is it [trust] *jus in rem* or *jus in personam*?" Walter G. Hart in (1912) 28 L. QUART. REV. 290. Cf. also the discussion of *The Nature of the Rights of the Cestui Que Trust*, by Professor Scott in (1917) 17 COLUMBIA L. REV. 269, and that on the same subject by Dean Stone in (1917) 17 *ibid.* 467.

²² There are also "paucital" relations of various kinds. In other words, an "equitable interest" is an extremely complex aggregate of multital and paucital rights, privileges, powers and immunities.

a generation of law students in this country had been trained under the influence of what might perhaps be called the "Langdell-Ames-Maitland" school of thought as to the relation of equity to common law. Perhaps the plainest statement of the point of view of this school is found in the following quotation from Maitland:

"Then as to substantive law the Judicature Act of 1873 took occasion to make certain changes. In its 25th section it laid down certain rules about the administration of insolvent estates, about the application of statutes of limitation, about waste, about merger, about mortgages, about the assignment of choses in action, and so forth, and it ended with these words:

'Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.'

"Now it may well seem to you that those are very important words, for perhaps you may have fancied that at all manner of points there was a conflict between the rules of equity and the rules of the common law, or at all events a variance. But the clause that I have just read has been in force now for over thirty years, and if you will look at any good commentary upon it you will find that *it has done very little—it has been practically without effect*. You may indeed find many cases in which some advocate, at a loss for other arguments, has appealed to the words of this clause as a last hope; but you will find very few cases indeed in which that appeal has been successful. I shall speak of this more at large at another time, but it is important that even at the very outset of our career we should form some notion of the relation which existed between law and equity in the year 1875. *And the first thing that we have to observe is that this relation was not one of conflict. Equity had come not to destroy the law, but to fulfil it. Every jot and every tittle of the law was to be obeyed*, but when all this had been done something might yet be needful, something that equity would require. Of course now and again there had been conflicts: there was an open conflict, for example, when Coke was for indicting a man who sued for an injunction. But such conflicts as this belong to old days, and for two centuries before the year 1875 the two systems had been working together harmoniously.

"Let me take an instance or two in which something that may for a moment look like a conflict becomes no conflict at all when it is examined. Take the case of a trust. An examiner will sometimes be told that whereas the common law said that the trustee was the owner of the land, equity said that the *cestui que trust* was the owner. Well here in all conscience there seems to be conflict enough. Think what this would mean were it really true. There are two courts of co-ordinate jurisdiction—one says that A is the owner, the other says that B is the owner of Blackacre. That means civil war and utter anarchy. Of course the statement is an extremely crude one, it is a misleading and a dangerous statement—how misleading, how dangerous, we shall see when we come to examine the nature of equitable estates. Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added

that he was bound to hold the land for the benefit of the *cestui que trust*. *There was no conflict here*. Had there been a conflict here the clause of the Judicature Act which I have lately read would have abolished the whole law of trusts. Common law says that A is the owner, equity says that B is the owner, but equity is to prevail, therefore B is the owner and A has no right or duty of any sort or kind in or about the land. Of course the Judicature Act has not acted in this way; it has left the law of trusts just where it stood, because it found no conflict, no variance even, between the rules of the common law and the rules of equity.”²³

To Hohfeld's logical and analytical mind this was not only not a truthful description but about as complete a misdescription of the true relations of equity and common law as could be devised. He believed, moreover, that it was heresy in the sense that it departed from the traditional view as found in classic writers upon equity, such as Spence and others, and embodied in the English Judicature Act in the well-known clause which is criticized by Maitland in the passage quoted. As the latter himself seems to recognize in other passages in his writings,²⁴ equity came, not to “fulfill every jot and tittle” of the common law, but to reform those portions of it which to the chancellor seemed unjust and out of date. Just how law can at the same time be fulfilled and yet reformed is certainly difficult to see.

A demonstration of the “conflict” between equity and law, i. e., of the fact that in many respects equity is a system of law paramount to and repealing *pro tanto* the common-law rules upon the same point, can be made fully clear only by one and to one who first of all understands the eight fundamental legal conceptions. Such a one need not use the precise terminology adopted by Hohfeld, but the concepts themselves he must clearly have in mind. What Hohfeld here did, therefore, was to take the orthodox and sound theory of equity as a system which had effectually repealed *pro tanto* large portions of the common law and by more scientific analysis conclusively demonstrate its truth.

Rights in the general sense (legal relations in general) are commonly divided into those which are “legal” and those which are “equitable,” the usual meaning given to these terms being that the former are recognized and sanctioned by courts of common law and the latter by courts of equity. If we examine these so-called “legal” rights, etc., more carefully than is usually done, we find that they clearly fall into two classes, viz., (1) those which a court of equity will in one way or another render of no avail; (2) those with the assertion of which a court of equity will not interfere. Compare, for example, the

²³ Maitland, *Equity*, 16-18.

²⁴ Especially in his essay upon *The Unincorporate Body*, 3 *Collected Papers*, 271.

so-called "legal (common-law) title" of a constructive trustee with the "legal title" of an owner who is free from any trust. Clearly the "legal ownership" of the former is largely illusory, while that of the latter is quite the opposite. The truth of the situation appears when, calling to our aid the eight fundamental conceptions, we examine the situation in detail. We then discover, for example, that while the common-law court recognizes that the constructive trustee is privileged to do certain things—e. g., destroy the property in question, or sell it, etc.—in equity he is under a duty not to do so. In other words, there is an "exclusively equitable" duty which conflicts with and so nullifies each one of the "legal" (common-law) privileges of the constructive trustee.²⁵

Careful consideration leads, therefore, to the conclusion that an "exclusively common-law" relation, i. e., one which only the courts of common law will recognize as valid, is as a matter of *genuine substantive law* a legal nullity, for there will always be found some other "exclusively equitable" relation which prevents its enforcement. Thus, to take another concrete example, a tenant for life without impeachment of waste has a common-law *privilege* to denude the estate of ornamental and shade trees, but in equity is under a *duty* not to do so. As *privilege* and *duty* are "jural opposites," the "equity law" turns out to be exactly contrary to the "common-law law." As equity has the last word, it follows that the "common-law privilege" is purely illusory as a matter of genuine substantive law.²⁶ The reader who wishes to pursue the analysis through a large number of concrete examples will find ample material in the essay under discussion. Limitations of space forbid more detailed treatment here.

All genuine substantive-law relations therefore fall into two classes: (1) those recognized as valid by both courts of common law and courts of equity; (2) those recognized as valid exclusively by equity. The former we may call "concurrent," the latter, "exclusive." The word "concurrent" is perhaps open to criticism. When Hohfeld called a legal relation "concurrent" he did not mean to assert that it will as such necessarily receive direct "enforcement" in equity as well as at law. Equity may "concur" in recognizing the validity of a given relation either actively or passively—actively, by giving equitable remedies to vindicate it; passively, by refusing to prevent its enforce-

²⁵ And so of the major portion of the other legal relations supposed to be vested in the "constructive trustee." Some of the relations are, however, "concurrent," for example, the *power* to convey a "title" free from the trust to a *bona fide* purchaser for value.

²⁶ But not as a matter of procedural law. The "common-law courts" will treat the "exclusively common-law" legal relations as though they were valid. In a code state this means at most that the facts giving rise to the paramount "exclusive," i. e. exclusively equitable, relations must be pleaded affirmatively as "equitable counterclaims" and not as mere "defences."

ment in a court of common law. Consider, for example, the right of an owner and possessor of land that others shall not trespass upon it. So long as the common-law action for damages is adequate, equity gives no direct aid; but, on the other hand, equity does not prevent the recovery of damages at law for the trespass. Just as soon as damages are inadequate, however, equitable remedies may be invoked. A right of this kind may fairly be called "concurrent" and not merely "legal" (common-law).

The matter may perhaps be put shortly as follows: what are commonly called "legal" or common-law rights (and other legal relations) really consist of two classes: (1) those which are in conflict with paramount exclusively equitable relations, and so are really illusory; (2) those which do not so conflict and are therefore valid. The latter are "concurrent."

Legal relations which are recognized as valid by equity but not by common law are common enough in our system and are, of course, valid. They may properly be called "exclusive," i. e., exclusively equitable. It may here be noted that it has happened over and over again that given legal relations were at first "exclusive" but that after a time, because of changes in the common law, they became "concurrent." This, for example, is true of the rights, etc., of the assignee of an ordinary common-law chose in action.²⁷ While originally the assignee's interest was "exclusive," he acquires to-day not the "legal title" to the chose in action, but an aggregate of legal relations which are "concurrent," just as were those of the assignor before the assignment.²⁸

Be it noted this classification of really valid legal relations into those which are "concurrent" and those which are "exclusive," applies equally to all the fundamental relations—rights, privileges, powers, and immunities and their correlatives. To take a simple concrete example: At one period of our legal development the assignor of a chose in action seems to have had an "exclusively common-law" (and therefore, as a matter of substantive law, invalid) *power* to release the debtor, even after notice from the assignee. In equity, however, at the same period, such a release was not recognized as valid, i. e., the assignee had, after notice to the debtor of the assign-

²⁷ See the present writer's discussion of *The Alienability of Choses in Action* in (1916) 29 HARV. L. REV. 816 and (1917) 30 HARV. L. REV. 449, in which the history of the assignee's "rights" is set forth.

²⁸ In his criticisms of my discussion of the "rights" of an assignee of a *chose in action*, Professor Williston—partly, it is believed because of a failure to appreciate fully the significance of the concept of "concurrent" legal relations—has misapprehended and so unconsciously misstated my position. This is true even in his final article. His discussions will be found in (1916) 30 HARV. L. REV. 97 and (1918) 31 HARV. L. REV. 822.

ment, an "exclusive" (exclusively equitable) *immunity* from having the legal relations which the assignment vested in him divested by acts of the assignor. The assignor was at the same time under an "exclusive" *duty* not to execute such a "release," although he had an "exclusively common-law" (but really invalid) *privilege* to do so. At a later period these relations became "concurrent"; for example, the "exclusive" immunity became "concurrent," so that a release by the assignor after notice to the debtor of the assignment was inoperative both at law and in equity.²⁹

The present writer has been teaching equity to law students for some eighteen years. During the past few years he has made greater and greater use of Hohfeld's analysis of the relations of law and equity, as well as of the more fundamental legal conceptions, and has found it of the greatest utility in class-room discussion and statement of the actual system of law under which we live. The terms "concurrent" and "exclusive" may possibly be open to criticism. It may, for example, be thought that "concurrent" savors too much of activity and does not sufficiently suggest passive concurrence in the validity of a given relation. Thus far, however, no better terms have suggested themselves, or have been suggested by others, and as it is difficult to use concepts without names, those suggested by Hohfeld have been used with success. The important thing, after all, is to enable the student and the lawyer to formulate general statements which enable us to give an accurate picture of our legal system and to discuss our legal problems intelligently. In the doing of these things the conceptions denoted respectively by the terms "concurrent" and "exclusive" seem to the present writer an indispensable aid.

In the space at hand it is not possible even to summarize the contents of the other essays enumerated in the list of Hohfeld's writings. Of those which have not been discussed, the most important are the articles upon the *Individual Liability of Stockholders* in the ninth and tenth volumes of the COLUMBIA LAW REVIEW. In the first of these will be found first of all an intelligible theory of what a corporation really is—intelligible, that is, to those readers who will take the trouble to think the matter through with Hohfeld in the terms of the fundamental legal conceptions which he uses, but absolutely unintelligible to those who will not. The current theory of a corporation as a "juristic person" disappears under the relentless logic of Hohfeld's analysis, and we see how the recognition of the fact that the only "persons" are human beings does not prevent us from adequately describing all the legal phenomena which accompany so-called "corporate existence." In the second of the two essays in question will be found a valuable contribution to the theory of the conflict of

²⁹ For citation of cases, see the articles cited in note 27, *supra*.

laws—a field in which Hohfeld had planned and hoped to write extensively. Undoubtedly, too, his studies in the conflict of laws led him to see more clearly than ever the necessity for a careful analysis of fundamental conceptions, and the confusion which exists in that field, especially as to the nature of law and its territorial operation, furnished him with an abundance of material which stimulated a naturally keen interest along analytical lines.

The address upon a *Vital School of Jurisprudence and Law*, delivered before the Association of American Law Schools in 1914, was a summons to the law schools of the country to awake and do their full duty in the way of training men, not merely for the business of earning a living by “practicing law,” but also for the larger duties of the profession, so that they may play their part as judges, as legislators, as members of administrative commissions, and finally as citizens, in so shaping and adjusting our law that it will be a living, vital thing, growing with society and adjusting itself to the *mores* of the times. The programme thus outlined he lived to see adopted substantially as that of the school with which he was connected but, alas! he was not spared to see it carried out in any large measure. That it may become the ideal of every university law school worthy of the name, is devoutly to be wished. Granted that it is an ideal—a “counsel of perfection,” as the dean of one large law school was heard to remark upon the occasion of its delivery—is that a reason why we of the law schools should not come as near to reaching it as we can? If to-day it is still a substance of things hoped for rather than of things attained, shall we not labor the harder, that in the days to come achievement may not fall so far short of aspiration?

“Hohfeld is an idealist,” “a theorist”—these and similar remarks the present writer has heard all too often from the lips of supposedly “practical” men. Granted; but after all ideals are what move the world; and no one recognized more clearly than did Hohfeld that “theory” which will not work in practice is not sound theory. “It is theoretically correct but will not work in practice” is a common but erroneous statement. If a theory is “theoretically correct” it will work; if it will not work, it is “theoretically incorrect.” Upon these propositions Hohfeld’s work was based; by these he would have it tested. “Theory,” to which he devoted his life, was to him a means to an end—the solution of legal problems and the development of our law so as to meet the human needs which are the sole reasons for its existence. In the opinion of the present writer, no more “practical” legal work was ever done than which is found in the pages of Hohfeld’s writings, and it is as such that the attempt has here been made to outline the more fundamental portions of it, in the hope that it may thus be brought to the attention of a wider circle of readers.